

AMENDMENTS RELATING TO SPECIAL VERDICTS

FRED L. HOFFMAN*

On October 4, 1955, Amended Senate Bill No. 79 which makes substantial changes in the statutory law affecting special verdicts and special findings became effective. Because of the elimination of technicalities it is expected that the use of special verdicts and special findings will become more prevalent.

Amended Senate Bill 79 amended sections 2315.12, 2315.14, 2315.15, 2315.16 and 2315.17 of the Ohio Revised Code.

Former sections 2315.12, 2315.14, 2315.15, 2315.16 and 2315.17 had their origin in sections 275, 276 and 277 of the Code of Civil Procedure, effective July 1, 1853.¹ From that date until the amendment of section 5201 Revised Statutes on May 18, 1894, the jury did not have the option of returning a general or special verdict except in actions for the recovery of money only or specific real property.² From 1894 until the passage of Amended Senate Bill 79 there were no changes of substance in the contents of the sections amended by Amended Senate Bill 79.

Before the adoption of the Code of Civil Procedure the following statute was in effect:

25 Section XXV. That no jury shall, in any case, be compelled to give in a general verdict, so that they find a special verdict, and show the truth of the fact, and require the aid of the court; but if, of their own will, they give a general verdict it shall be received.³

In the tenth report of the Judicial Council of Ohio to the 99th General Assembly the Judicial Council reported:

Considerable study of the use of special verdicts in the courts was carried on by the Judicial Council, and, as a result of these investigations, much confusion in the use of such verdicts was disclosed.

Repeated instances were cited wherein such special verdicts were returned with ambiguous, incomplete and conflicting findings, so that no judgment could be entered thereon, thus requiring the judge to grant a new trial in the interest of justice.

The Judicial Council of Ohio at that time recommended that the use of special verdicts be ended, by the amendment of section 11420-12 of the Ohio General Code, and the repeal of other pertinent sections, so that all verdicts returned by the jury would be general, as defined in section 11420-13 of the General Code. The report stated that the

*Of Cincinnati, Member of the Senate, 101st General Assembly; Chairman, Cities Committee; Vice-Chairman, Judiciary Committee, Member Ohio Bar.

¹ 51 Ohio Laws 102 (1853).

² 91 Ohio Laws 298 (1894).

³ Ohio Rev. Stat. (Swan) 496 (1841), 29 Ohio Laws 100 (1831).

reasons for the suggested changes were founded on the injustices which have resulted from their use, causing mistrials, and on the confusion of juries attempting to return such verdicts.⁴

To carry out such recommendations of the Judicial Council, House Bill 273 was introduced in the 99th General Assembly "To amend Sections 11420-12 and 11600 of the General Code, and to repeal Sections 11420-14, 11420-15 and 11520-16 of the General Code, relative to special verdicts of the jury." Considerable opposition developed to the entire elimination of special verdicts and H.B. 273 died in the House Judiciary Committee. Since its tenth report the Judicial Council has not seen fit to repeat or to make further recommendations concerning special verdicts.

Lawyers generally have hesitated to make use of special verdicts because of the uncertainty surrounding the interpretation and application of the former statutory provisions to a particular case and their inability to reasonably foresee where a request for a special verdict might lead them or what it might do to their case.

A verdict may be defined as the answer of a jury to the court concerning the matters of fact committed to their trial and examination.⁵

Section 2315.12 is amended to take away from the jury its option to render a general or special verdict unless otherwise directed. The jury in most instances never knew it had this option and it served no useful purpose. The former language "in all actions" was deleted because it was surplusage.

Section 2315.14 was amended to redefine a special verdict. The former language, *i.e.* . . . "facts only as established by the evidence to prove them," created difficult problems of interpretation and application in each case.

In practice the special verdict could be prepared for the jury either by the trial court or counsel representing the respective parties or by the court and counsel collaborating on form. It was a most arduous and difficult task to correctly and adequately formulate a special verdict.⁶

A special verdict could be in narrative form or in the form of answers to questions submitted.⁷

4. Either or both parties may submit a draft of a special verdict, but the jury are not bound by such drafts, for the statute directs that they shall find the facts.⁸

Sometimes competing forms of verdicts are submitted representing contentions of the opposite sides, respectively, as to what the evidence should be deemed to prove. If such forms are drawn up in narrative style it is manifest that however

⁴ Tenth Report of the Judicial Council of Ohio (1951).

⁵ 39 O. JUR., *Trial* §351.

⁶ *Herren v. Herman*, 24 Ohio L. Abs. 135, 136 (1937).

⁷ *Dowd-Feder Co. v. Schreyer*, 124 Ohio St. 504 (1931).

⁸ *C.C.C. & St. L. Ry. Co. v. Village of St. Bernard*, 19 Ohio Cir. Ct. 299 (1900).

useful they may be where the issue is single, they are quite unfitted to express the actual agreement of minds at which the jury will arrive respecting a great variety and complexity of issues and cross-issues, . . . a jury is but poorly qualified to draw up a form of special verdict of its own or to materially vary a form prepared in advance for its use.⁹

There was no limit on the number of forms of narrative verdict or on the number of questions in the interrogatory form which could be submitted.¹⁰

The jury could refuse to use any form submitted by the court and draft its own form.¹¹

The new language, *i.e.* ". . . separately upon each determinative issue tried by the jury" was selected for the following reasons: (a) The word "separately" was inserted so that protection against an application of the "two issue rule"¹² could be obtained and to furnish a means of securing a distinct finding by the jury on each determinative issue. (b) The word "determinative" was inserted to restrict the number and describe the issues to be submitted. The word "determinative" was selected because it had already been used by the courts to describe the issues meant to be delineated.

The judgment in a case involving two or more distinct issues, but in which the verdict is general, the particular issue upon which it is based not being disclosed by interrogatories or otherwise will be affirmed if the record is free from error as to one of such issues which ought to be determinative.¹³

3. Where none of issues determinative of controversy was tried and submitted free from error, judgment on general verdict cannot be sustained under two issue rule.¹⁴

"If the jury found that issue in favor of the defendant, it was determinative of the case."¹⁵

The words "issues tried by the jury" were selected to correspond with the statutory language found in section 2311.04 of the Revised Code.

The language "render judgment in accordance with such findings" was inserted in place of the words "draw from the facts found, conclusions of law" in order to conform to the language used in sections 2315.21 and 2323.17 of the Revised Code. This language was also selected to eliminate the technical problem of whether a special verdict contains a finding of ultimate facts on all issues.

Section 2315.15 was amended to make it the duty of the court to submit in writing each determinative issue when a special verdict

⁹ *Traction Co. v. Garnett*, 18 Ohio Cir. Ct. (N.S.) 215, 216 (1908).

¹⁰ *Miller v. Jackson*, 92 Ohio App. 199 (1951).

¹¹ *Looker v. Martin*, 61 Ohio L. Abs. 373 (1952).

¹² 39 O. JUR., *Trial* §263.

¹³ 4 O. JUR. 2d, *Appellate Review*, §869.

¹⁴ *Mulcalay v. Deitrich, Sr.*, 39 Ohio App. 65 (1931).

¹⁵ *Price v. The Times Press Co.*, 28 Ohio L. Abs. 501, 502 (1939).

is requested. This places the responsibility directly upon the court to see that the issues are fairly presented and that the salutary purpose of the section is carried out. The former section did not provide who should prepare the form of special verdict. This invariably caused trouble for counsel, the court and the jury whenever an attempt was made to have a special verdict returned.

The definition of a determinative issue used by the author of Amended Senate Bill 79 in presenting the bill before the General Assembly was as follows: "A determinative issue is an issue the deciding of which by the jury may in and of itself dispose of the entire case."

Former section 2315.16 providing for special findings of fact like the sections providing for special verdicts had long been a source of dispute as to its interpretation and application when applied to a particular case.

The proper preparation of interrogatories to meet the courts' varying interpretations and applications of former section 2315.16 when applied to a particular case had not been an easy task.

The interrogatories must be such as call for answers which will establish ultimate and determinative facts rather than mere probative facts as will permit an ultimate and determinative fact to be inferred as a matter of law.¹⁶

It is not an easy task to determine what are ultimate and what are probative facts, and some attention to the attempts of courts to define those terms is required.

Ultimate facts lie in the area between evidence and a conclusion of law. They are the essential and determining facts on which the final conclusion of law is predicated. They are deduced by inference from the evidentiary facts which can be directly established by testimony or evidence.¹⁷

2. It is error for a court to submit to a jury an interrogatory which requires an answer as to only a purely evidentiary or probative fact and not one of an ultimate and determinative character.

4. It is error to submit to a jury an interrogatory based upon an erroneous proposition of law.¹⁸

2. It is not error for the court to refuse to submit to the jury a list of interrogatories contained upon one sheet of paper if any one of the interrogatories is improper.

3. Interrogatories directed to specific evidentiary facts are properly refused.¹⁹

An interrogatory which calls for conclusion of fact or conclusion of mixed fact and law is not authorized by statute.²⁰ Section 2315.16 substitutes the language, "material allegations

¹⁶ *Gale v. Priddy*, 66 Ohio St. 400 (1902).

¹⁷ *Scott v. Cismadi*, 35 Ohio Op. 429, 432 (1947).

¹⁸ *McFadden v. Thomas*, 154 Ohio St. 405 (1951).

¹⁹ *Ford Motor Co. v. Dillon*, 51 Ohio App. 278 (1935).

²⁰ *Mason Tire Co. v. Lansinger*, 108 Ohio St. 277 (1923).

contained in the pleadings controverted by an adverse party" for the language, "questions of fact." The new language is adopted from section 2309.13.

New section 2315.16 also permits special findings where a special verdict is returned. This was done to preserve the right which a party had, under former section 2315.14, to have a finding of "facts only as established by the evidence" and to enable a special verdict to be tested in the same manner as a general verdict.

The amendment to section 2315.16 preserves its salutary purpose and makes its application more practical. New section 2315.16 requires the special findings to be submitted by the court in writing to the jury and relieves counsel of the burden of preparing findings which will meet the courts' approval. It puts the responsibility on the court to determine the form and substance of the findings which are submitted to the jury and to see to it that the findings are fairly presented and that the purpose of the section is carried out. Too often in applying the old section the courts seem to have gone out of their way to defeat the object of the section. The purpose of having findings submitted by the court in writing is to prevent repetitious, inadequate or confusing forms of findings being submitted to the jury by opposing counsel and of having only one side's theory of the case or of the evidence being submitted.

Section 2315.17 is amended so that findings on controverted material allegations will control both a general and special verdict. This was done because a special verdict under new section 2315.14 is a finding on the determinative issues and may or may not include a finding on a controverted material allegation which would be decisive of a determinative issue.²¹ A finding on a controverted material allegation may or may not control a finding on a determinative issue.²²

Amended Senate Bill 79 puts the responsibility on the judge, when requested, to fairly present both the determinative issues in a special verdict and the controverted material allegations in a special finding under section 2315.16. This has been the court's duty in charging the jury in the general charge in the past and therefore places no new burden upon the court.

²¹ Depending upon the language used by the court in submitting the determinative issue to the jury or upon the language used by the jury in making its finding upon such issue. The rigid requirements as to the language of special verdicts contained in the old statute to the effect that it shall contain facts and not the evidence or conclusions of law were eliminated by amended Senate Bill No. 79.

²² For example: An affirmative finding on a material allegation that the defendant failed to stop in obedience to a stop sign being negligence per se would control a finding on the determinative issue of a defendant's negligence while an affirmative finding on a material allegation that the defendant was operating his automobile at a speed of sixty-five miles per hour not constituting negligence per se would not control a finding on the determinative issue of the defendant's negligence.

1. In submitting a case to the jury, it is the duty of the court to separate and definitely state to the jury the issues of fact made in the pleadings accompanied by such instructions as to each issue as the nature of the case may require, and it also is the duty of the court to distinguish between and call attention of the jury to the material allegations of fact which are admitted and those which are denied. It is error to read the pleadings to the jury and then say to the jury, and not otherwise define the specific issues, that these constitute the pleadings in the case, which make up the issues, and from which they will try and determine the controversy between the parties.²³

5. It is the duty of the court to separately and definitely state to the jury the issues of fact made by the pleadings, accompanied by such instructions as to each issue as the nature of the case may require.²⁴

1. When a special verdict is demanded under section 11462, General Code, it is the duty of the trial court to cause each separate issue of fact to be submitted to the jury.²⁵

Some of the salutary effects of the passage of Amended Senate Bill 79 are as follows:

Competing forms of special verdicts are no longer necessary or proper in order to protect each side's rights.

Counsel is no longer required to prepare alternative forms of special verdicts or be prejudiced by his failure to do so.

The possibility of using intricate forms of special verdicts to trick, confuse or mislead the jury is eliminated.

Counsel cannot prepare a special verdict emphasizing certain evidence in order to obtain an advantage over the opposing side.

Counsel cannot prepare a special verdict emphasizing a certain issue in order to obtain an advantage over the opposing side.

Counsel cannot request a special verdict limited to a certain issue in order to obtain an advantage over the opposing side.

A jury in returning a special verdict is no longer concerned with the technical distinctions of whether a fact it is finding is an evidential, probative or ultimate fact.

An attempt has been made to eliminate the technical distinctions which some courts have made between ultimate, probative and evidentiary facts and conclusions of law, conclusions of fact and conclusions of mixed laws and facts, and which in the past have been used to defeat the purpose of the former sections.

The forms of special verdicts used in particular types of cases will become simplified and standardized so that no longer will competitive

²³ B. & O. R.R. Co. v. Lockwood, 72 Ohio St. 586 (1905).

²⁴ Simko v. Miller, 133 Ohio St. 345 (1938).

²⁵ Gendler v. Cleveland Ry. Co., 18 Ohio App. 48 (1923).

advantages arise out of the wording or contents of a form prepared by one side or the other to favor its side of the case.

The technical problem of whether the special verdict contains a finding of ultimate facts on each issue is eliminated because it now becomes the responsibility of the court to separately submit each determinative issue to the jury.

Where either a general or special verdict is to be returned, the court will instruct the jury on the law of the case and direct the jury, in arriving at their verdict, to apply those instructions to the facts found by them. The limitation as to instructions where a special verdict is requested, pointed out in the case of *Dowd-Feder Co. v. Schreyer*,²⁶ will no longer apply.

The right of either party to a litigation to ask the court to direct a jury to return a special verdict is retained. The court must grant such a request and has no discretion in the matter.

The jury is bound by the court's instructions and must return the type of verdict directed by the court.

As under the former sections no particular form of request is necessary in order to require a trial court to direct the jury to return a special verdict.

No fixed time is prescribed by the Revised Code within which a party is required to request a special verdict.²⁷

As under former section 2315.16 special findings may be required with reference to a single controverted material allegation, or any number of controverted material allegations less than all, or all of the controverted material allegations as counsel may request.

The purpose of section 2315.16 remains the same, by eliciting a determination of material facts to furnish the means of testing the correctness of the verdict.²⁸

The special findings continue to control the verdict, but do not dispense with it.

The element of surprise which has played such a large part in the use of special verdicts and special findings is virtually eliminated. Both sides can with reasonable certainty foresee what form of special verdict or special findings the court might submit.

Pre-trial hearings will be utilized more fully by both sides to reach agreement upon the issues involved in order to see that the case is fairly presented to the jury on its determinative issues and that each side presents its case on the issues which will be submitted.

The pleadings will tend to state the material allegations more clearly and distinctly. This should benefit both the court and the jury.

²⁶ *Dowd-Feder Co. v. Schreyer*, 104 Ohio St. 504 (1931).

²⁷ *B.&O. R.R. Co. v. McCamey*, 12 Ohio Cir. Ct. 543 (1896).

²⁸ *C. & E. Electric R.R. v. Hawkins*, 64 Ohio St. 391 (1901).

General denials probably will be used less frequently because of the knowledge that a material allegation which is denied may be made the subject of a special finding.

There will be less confusion on the part of the jury in understanding what the case is about, what their duty is, and how they are to apply the judge's instructions.

The chance of a miscarriage of justice because of the jurors' inability to retain all of the evidence and all of the court's instructions in their minds will be lessened.

The probability that the verdict will be decided upon the issues according to the law, and the evidence, will be increased.